Yatin bin Mahmood v Mohd Madzhar bin Sapuan & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-1) 22–194 OF 2004
VERNON ONG JC
6 JANUARY 2010

Banking — Banker and customer — Duty of care — Bank negligent in failing to verify transactions — Failure to verify unusual and substantial cash withdrawals — Whether bank had duty to make enquiries notwithstanding mandate — Whether bank acted recklessly

Banking — Banker and customer — Mandate — Whether bank may act according to mandate without making necessary verifications — Failure to verify unusual and substantial cash withdrawals — Whether breach of duty by bank notwithstanding acting according to mandate

Banking — Banker and customer — Relationship — Agent and principal relationship in drawing and payment of cheques — Fiduciary duties owed by bank to customer — Duty of reasonable care and skill in carrying out customer's instructions — Duty to make enquiries and verification in appropriate cases

Contract — Formation — Concluded contract — Party to contract pleading ignorance or negligence — Party to contract claiming not to know nature and effect of contract — Whether party bound by contract — Whether illiteracy and non est factum not pleaded

Evidence — Burden of proof — Fraud alleged in civil case — Onus on plaintiff to establish fraud beyond reasonable doubt — Whether proof beyond shadow of doubt required — Plaintiff to prove high degree of probability and not mere possibility — Whether allegation of conspiracy to defraud proven

The first and second defendants were the partners of the legal firm of Madzar Mohd Sapuan & Co. The first defendant acted for the plaintiff for the refinancing of the plaintiff's bungalow house in 1999. The plaintiff obtained a loan of RM500,000 from the third defendant out of which the redemption sum of RM180,000 was paid to Bank Bumiputra Malaysia Bhd. The third defendant paid out the balance sum of RM320,000 to the first defendant who never paid it to the plaintiff. Then, sometime in 2000 the plaintiff

agreed to sell his bungalow house to the first defendant for RM800,000. The first defendant obtained a bank loan of RM960,000 to finance the purchase. After settling the redemption sum the first defendant's bank issued a cashier's order for RM439,939.07 in the plaintiff's name for the balance purchase price. The first defendant presented the cashier's order into the plaintiff's account with the third defendant. The plaintiff's account with the third defendant was opened by the first defendant without the plaintiff's knowledge. The first defendant later issued a cheque and withdrew RM439,439 from the plaintiff's account without the plaintiff's knowledge. The first defendant was at all material times acting for the plaintiff and the third defendant in the sale and charge transactions. The plaintiff therefore claimed against the third defendant losses due to the alleged negligence of the third defendant in releasing the sums of RM439,939.07 and RM272,519.87 to the first defendant. The plaintiff also claimed that the first defendant conspired with the third defendant to cheat the plaintiff. Judgment in default had already been obtained against the first and second defendants. The third defendant claimed that the plaintiff had opened an account with the third defendant and had given a mandate to the first defendant to operate the account.

Held, allowing the plaintiff's claim with costs:

(1) The plaintiff here was not illiterate and neither had he pleaded *non est factum*. Having signed the documents for the opening of the account he was bound by it and could not plead ignorance or negligence in executing the same. The plaintiff's contention that he did not know of the nature and effect of the mandate was without basis. The plaintiff was bound by the mandate empowering the first defendant to operate the account (see paras 8–9).

(2) All the transactions were carried out by the first defendant under the mandate. A bank which acts in accordance with the mandate is duly authorised. However, eight cash withdrawals amounting to RM235,611.91 were made on 13 May 1999 and 14 May 1999. The substantial cash withdrawals within two days were unusual that this must have alerted the third defendant. Notwithstanding this fact, the third defendant failed to verify the cash transactions with the plaintiff. The third defendant cannot rely on the mandate to turn a blind eye to any unusual or out of the ordinary cash withdrawal. Notwithstanding the mandate, it was the duty of the third defendant to make inquiries (see paras 12–13).

(3) The relationship between the third defendant (a banker) and the plaintiff (a customer) relating to the drawing and payment of the plaintiff's cheques against the money in the account is that of principal and agent; and as agent, the third defendant owed fiduciary duties to

the plaintiff and prima facie was also bound to exercise reasonable care and skill in carrying out the instructions of the plaintiff. The standard of care is that derived from the ordinary practice of bankers. The third defendant had acted recklessly in failing to make such inquiries as an honest and reasonable person would (see para 13).

(4) The existence of fraud is a question of fact. It is dependent upon the circumstances of each particular case. The onus is upon the plaintiff to establish the alleged fraud beyond reasonable doubt. Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see para 18).

(5) The trail of the misappropriated monies led to the first defendant alone. There was nothing to suggest that the first defendant acted in concert with the third defendant. There was nothing for the court to justify a finding that the first defendant conspired or colluded with the third defendant to deprive the plaintiff of his monies (see para 18).

[Bahasa Malaysia summary

Defendan-defendan pertama dan kedua merupakan rakan kongsi firma guaman Madzar Mohd Sapuan & Co. Defendan pertama bertindak bagi pihak plaintif untuk pembiayaan semula rumah banglo plaintif pada tahun 1999. Plaintif mendapat pinjaman RM500,000 daripada defendan ketiga yang mana RM180,000 daripada jumlah penebusan dibayar kepada Bank Bumiputra Malaysia Bhd. Defendan ketiga telah membayar jumlah baki RM320,000 kepada defendan pertama yang tidak pernah membayarnya kepada plaintif. Kemudian, pada tahun 2000 plaintif bersetuju untuk menjual rumah banglonya kepada defendan pertama pada harga RM800,000. Defendan pertama mendapat pinjaman bank sejumlah RM960,000 untuk membiayai belian. Setelah menyelesaikan jumlah penebusan itu bank defendan pertama telah mengeluarkan perintah juruwang sejumlah RM439,939.07 atas nama plaintif baki harga belian. Defendan pertama telah mengemukakan perintah juruwang ke dalam akaun plaintif bersama defendan ketiga. Akaun plaintif bersama defendan ketiga dibuka oleh defendan pertama tanpa pengetahuan plaintif. Defendan pertama kemudian telah mengeluarkan cek dan mengeluarkan RM439,439 daripada akaun plaintif tanpa pengetahuan plaintif. Defendan pertama pada setiap masa matan telah bertindak bagi pihak plaintif dan defendan ketiga dalam transaksi-transaksi jualan dan gadaian. Oleh itu plaintif menuntut terhadap defendan ketiga kerugian akibat daripada kecuaian defendan ketiga membayar jumlah-jumlah RM439,939.07 dan RM272,519.87 kepada

defendan pertama. Plaintif juga menuntut bahawa defendan pertama telah berkomplot dengan defendan ketiga untuk menipu plaintif. Penghakiman ingkar telahpun diperoleh terhadap defendan-defendan pertama dan kedua. Defendan ketiga mendakwa bahawa plaintif telah membuka akaun bersama defendan ketiga dan telah memberikan mandat kepada defendan pertama untuk mengendalikan akaun itu.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Plaintif di sini bukan seorang yang buta huruf dan juga tidakpun merayu *non est factum*. Dengan menandatangani dokumen-dokumen untuk membuka akaun itu dia terikat olehnya dan tidak boleh merayu kerana tidak tahu atau cuai dalam melaksanakan yang sama. Hujah plaintif bahawa dia tidak mengetahui sifat dan kesan mandat itu adalah tanpa asas. Plaintif terikat oleh mandat yang memberi kuasa kepada defendan pertama untuk mengendalikan akaun itu (lihat perenggan 8–9).

(2) Kesemua transaksi tersebut telah dilaksanakan oleh defendan pertama di bawah mandat itu. Bank yang bertindak menurut mandat telahpun diberikan kuasa. Walau bagaimanapun, lapan pengeluaran wang tunai berjumlah RM235,611.91 telah dibuat pada 13 Mei 1999 dan 14 Mei 1999. Pengeluaran wang tunai yang banyak dalam dua hari adalah luar biasa dan cepat disedari oleh defendan ketiga. Meskipun begitu, defendan ketiga telah gagal untuk mengesahkan transaksi-transaksi wang tunai itu dengan plaintif. Defendan ketiga tidak boleh bergantung kepada mandat itu untuk tidak menyatakan apa-apa tentang pengeluaran wang tunai yang tidak biasa atau luar biasa. Walaupun terdapat mandat itu, ianya kewajipan defendan ketiga untuk membuat siasatan (lihat perenggan 12–13).

(3) Hubungan antara defendan ketiga (pengurus bank) dan plaintif (pelanggan) berhubung pengeluaran dan pembayaran cek-cek plaintif berbanding dengan wang dalam akaun yang mana adalah sebagai prinsipal dan ejen; dan sebagai ejen, defendan ketiga mempunyai kewajipan fidusiari kepada plaintif dan prima facie adalah juga terikat untuk mempunyai sikap berjaga-jaga dan kemahiran yang munasabah dalam melaksanakan arahan-arahan plaintif. Piawai berjaga-jaga adalah yang datangnya daripada amalan biasa pengurus bank. Defendan ketiga telah bertindak semberono kerana gagal membuat siasatan sedemikian sebagaimana seorang yang jujur dan munasabah akan lakukan (lihat perenggan 13).

(4) Kewujudan fraud adalah persoalan fakta. Ia bergantung kepada keadaan setiap kes tertentu. Beban terletak pada plaintif untuk membuktikan fraud yang dikatakan itu melampaui keraguan munasabah. Walau bagaimanapun, bukti melampaui keraguan munasabah tidak

bermaksud bukti melampaui bayangan keraguan. Tahap pembuktian hendaklah mempunyai tahap kebarangkalian yang tinggi agar dengan keterangan yang dikemukakan mahkamah mempercayai kewujudannya atau seorang yang waras akan mempertimbangkan kewujudannya adalah mungkin dalam keadaan kes tertentu. Jika bukti sedemikian hanya setakat satu kebarangkalian tetapi tidak sedikitpun bukan satu kemungkinan maka ia gagal untuk membuktikan melampaui keraguan munasabah (lihat perenggan 18).

(5) Sejarah wang yang dilesapkan menunjukkan kepada defendan pertama sahaja. Tiada apapun yang mencadangkan bahawa defendan pertama bertindak bersama defendan ketiga. Tiada apapun untuk mahkamah menjustifikasikan penemuan bahawa defendan pertama berkomplot atau berpakat sulit dengan defendan ketiga untuk menafikan plaintif wangnya (lihat perenggan 18).]

Notes

For cases on banker and customer in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1799–2271.

For cases on concluded contract, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3747–3763.

For cases on duty of care, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1825–1834.

For cases on fraud alleged in civil case, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 530–547.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1; [2006] 3 CLJ 1, FC (refd)

Abrath v The North Eastern Railway Co (1883) 11 QBD 440, CA (refd)

Barclays Bank plc v Ouincecare Ltd & Anor [1992] 4 All ER 363, QBD (refd)

Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128; [1993] 2 CLJ 640, HC (refd)

Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34, SC (refd)

Commissioners of Taxation v English, Scottish and Australian Bank, Ltd [1920] AC 683, PC (refd)

Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23, HC (refd)

Lee Cheong Fah v Soo Man Yoke [1996] 2 MLJ 627, HC (refd)

Lloyds Bank Ltd v Bundy [1974] 3 All ER 757, CA (refd)

Lloyds Bank Ltd v EB Savory & Co [1933] AC 201, HL (refd)

M Ratnavale v S Lourdenadin [1988] 2 MLJ 371, SC (refd)

N Joachimson (a firm name) v Swiss Bank Corp [1921] 3 KB 110, CA (refd)

PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)

Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)

Selvaduray v Chinniah [1939] MLJ 253, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101(1), 102

Mathews George (John Fernandez with him) (Mathews George & Co) for the plaintiff.
Gunadesan (Ali Zaitun & Baharudin) for the third defendant.

Vernon Ong JC:

[1] Yatin bin Mahmood's ('the plaintiff') claim against Malayan Banking Bhd ('the third defendant') is for losses and damages suffered due to the alleged negligence of the third defendant in releasing the sums of RM439,939.07 and RM272,519.87 to Mohd Madzhar bin Mohd Sapuan ('the first defendant'). The first defendant and Hanizah bt Muhammad ('the second defendant') were the partners of the legal firm of Madzar Mohd Sapuan & Co. Judgment in default has already been obtained against the first and second defendants.

THE PLAINTIFF'S CASE

[2] The first defendant acted for the plaintiff for the re-financing of the plaintiff's bungalow house in 1999. The plaintiff obtained a loan of RM500,000 from the third defendant out of which the redemption sum of RM180,000 was paid to Bank Bumiputra Malaysia Bhd. The balance sum of RM320,000 was not paid to the plaintiff. The third defendant was negligent when it paid out the balance sum to the first defendant.

[3] Sometime in 2000 the plaintiff agreed to sell his bungalow house to the first defendant for RM800,000. The first defendant obtained a bank loan of RM960,000 to finance the purchase. After settling the redemption sum the first defendant's bank issued a cashier's order for RM439,939.07 in the plaintiff's name for the balance purchase price. The first defendant presented the cashier's order into the plaintiff's account with the third defendant. The plaintiff's account with the third defendant was opened by the first defendant without the plaintiff's knowledge. On 14 June 2000 the first defendant issued a cheque and withdrew RM439,439 from the plaintiff's account without the plaintiff's knowledge. The withdrawal of the said sum was due to the negligence of the third defendant. The first defendant was at all material times acting for the plaintiff and the third defendant in the sale and charge transactions. The first defendant conspired with the third defendant to cheat the plaintiff.

THE THIRD DEFENDANT'S CASE

[4] The plaintiff operated an account with the third defendant on 6 May 1999. The account was opened pursuant to an overdraft facility granted to the plaintiff by the third defendant pursuant to a charge created by the plaintiff. The plaintiff appointed the first defendant to prepare the documentation for the refinance of the plaintiff's property of RM500,000. The plaintiff's address given to the third defendant is No 7, Jalan Padi Malinja 4, Bandar Baru Uda, 81200 Johor Bahru as stated in the plaintiff's statutory declaration and application form. The plaintiff also gave a mandate to the first defendant to operate the account. The third defendant is bound by the plaintiff's mandate given to the first defendant to operate the account. The plaintiff conspired with the first defendant to defraud the third defendant.

THE FACTS AS DISCLOSED IN THE EVIDENCE

[5] The plaintiff gave evidence on oath in support of his case. The third defendant called two witnesses to give evidence. In 1999 the plaintiff wanted to refinance his bungalow house which was then charged to Bank Bumiputra Malaysia Bhd ('BBMB'). For that purpose the plaintiff opened an account under No 501208–507067 ('the account') with the third defendant and applied for a loan. The fact that the plaintiff's signatures appear on the application form, the specimen signature card for the opening of the account, and the mandate is not disputed. Under the mandate the first defendant is empowered to operate the account. The specimen signature card also carries the name and signature of the first defendant. According to the application form, specimen signature card and the plaintiff's statutory declaration affirmed on 26 April 1999, the plaintiff's address is stated as No 7, Jalan Padi Malinja 4, Bandar Baru Uda, 81200 Johor Bahru. The third defendant granted the plaintiff a loan of RM500,000 comprising of RM220,000 in housing loan facility and RM280,000 in overdraft facility. After the redemption sum of RM227,480.13 was paid to BBMB, the bungalow house was charged to the third defendant as security for the loan.

[6] Subsequently the plaintiff met the third defendant's branch manager one Kamarudin bin Hj Hussin to enquire about the balance of the loan sum of RM272,519.87. When the plaintiff discovered that the balance of the loan sum have been taken out by the first defendant the plaintiff threatened to lodge a police report. Kamarudin then telephoned the first defendant who subsequently turned up to meet them. To settle the matter the first defendant agreed to buy the plaintiff's bungalow house for RM800,000. The plaintiff and the first defendant then entered into an agreement for the sale and purchase of the bungalow. The first defendant obtained a loan of RM960,000

from Standard Chartered Bank ('SCB') to finance the purchase of the bungalow. By a letter dated 19 May 2000 the third defendant wrote to SCB informing that the redemption sum amounted to RM520,060.93. On 29 May 2000 SCB issued a cashier's order of RM520,060.93 to the third defendant in settlement of the redemption sum. SCB also issued a cashier's order for the balance of the loan amounting to RM439,939.07 in the plaintiff's name. The cashier's order was paid into the plaintiff's account with the third defendant. On 16 June 2000 the sum of RM439,439 was transferred from the plaintiff's account to the first defendant's account under a cheque dated 14 June 2000 signed by the first defendant. On 5 December 2001 the plaintiff lodged a police report stating that he has not yet received the purchase price for the sale of the bungalow to the first defendant and that he believed that he had been cheated by the first defendant.

FINDINGS OF THE COURT

[7] The plaintiff's claim is predicated upon monies in the account belonging to the plaintiff being misappropriated by the first defendant. The plaintiff asserts that he had no knowledge of the account or of the transactions carried out by the first defendant on the account. In the light of the facts as disclosed in the evidence, the issues to be determined are as follows:

(a) whether the account was in fact opened and operated by the plaintiff? If so, whether the plaintiff is bound by the mandate empowering the first defendant to operate the account;

(b) whether the third defendant observed reasonable skill and care in and about executing the plaintiff's orders when the balance of the loan sum of RM272,519.87 in the account was taken out by the first defendant;

(c) whether the third defendant observed reasonable skill and care in and about executing the plaintiff's orders when RM439,439 was transferred from the account to the first defendant's account; and

(d) whether the first defendant conspired with the third defendant to cheat the plaintiff.

(a) Whether the account was in fact opened and operated by the plaintiff? If so, whether the plaintiff is bound by the mandate empowering the first defendant to operate the account

[8] The plaintiff's contention that he did not know that the account was opened and operated must be examined against the evidence. He has admitted to signing the application form for the opening of the account. He has also admitted that he signed the specimen signature card and mandate.

The said documents are documents which are customarily signed by an applicant in the process of opening a bank account. The plaintiff used to work as a forwarding agent. He also operated accounts with BBMB, Lembaga Tabung Haji and Amanah Saham Bumiputra. He is a businessman and when he signed the said documents he must have known that they were meant for the purpose of opening an account with the third defendant. His contention that he signed the documents at a restaurant and that the details were not filled in is of no avail as he knew the nature and effect of the documents. This is fortified by the fact that the opening of the account was necessary towards the plaintiff's application to the third defendant for a loan to refinance his bungalow house. Because he knew that the account was opened he went to see Kamarudin to enquire about the balance of the loan sum of RM272,519.87. The general rule is that a man is estopped by his deed, and although there is no such estoppel in the case of ordinary signed documents, a person of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not. If, however, a person has been misled into signing a document essentially different from that which he intended to execute or sign, he can plead *non est factum*; in most cases in which *non est factum* has been successfully pleaded, the mistake has been induced by fraud (*Chitty on Contracts*, Vol 1 para 5.032). In this instance, the plaintiff is not illiterate and neither has he pleaded *non est factum*. Having signed the said documents for the opening of the account he is bound by it and cannot now plead ignorance or negligence in executing the same (*Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; [1993] 2 CLJ 640).

[9] In the light of the above findings the court holds that the account was opened and operated by the plaintiff. As for the mandate, the plaintiff contends that he would not have signed it if he had been informed as to the nature and effect of the document. The mandate is a printed document prepared by the third defendant. It consists of two pages and the word 'mandat/mandate' is printed in bold at the top of the first page. The terms of the mandate are set out in Malay and English. It states out clearly that the plaintiff is notifying the third defendant that he has empowered the first defendant to operate the account. The plaintiff's signature appears on the second page. The first defendant's name and specimen signature also appears on the second page. The mandate dated 10 May 1999 has been duly stamped. The plaintiff's contention that he did not know of the nature and effect of the mandate is without basis for the reasons cited above. In the premises the court finds that the plaintiff is bound by the mandate empowering the first defendant to operate the account.

(b) Whether the third defendant observed reasonable skill and care in and about executing the plaintiff's orders when the balance of the loan sum of RM272,519.87 in the account was taken out by the first defendant

[10] The relationship of banker to customer is one founded on contract. In

general, it consists of a general contract, which is basic to all transactions, together with special contracts which arises only as they are brought into being in relation to specific transactions or banking services (*Paget's Law of Banking* 12th Ed, p 116). The classic description of this contract is that of Atkin LJ in *N Joachimson (a firm name) v Swiss Bank Corp* [1921] 3 KB 110 at p 127:

> The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in exercising his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such a contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the branch at which the current account is kept.

[11] The plaintiff's contention is that the account was opened by the first defendant in the plaintiff's name. The first defendant then went on to operate the account as if it was his own account between 15 May 1999–15 September 2000 as reflected in the statement of account for the said period. There is no evidence that the third defendant contacted the plaintiff to verify any of the said transactions. The first defendant was a solicitor acting for the plaintiff and had influence over the plaintiff (*Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757). The plaintiff had in re-examination said that he entrusted all his dealings in the hands of the first defendant. Learned counsel for the plaintiff argued that the third defendant failed to establish certain crucial facts (i) before whom the account was opened; (ii) was the plaintiff physically present at the third defendant's premises when he signed the documents; and (iii) did anyone verify the plaintiff's signatures? It was also submitted that the third defendant failed to comply with its own guidelines that (i) the identity of the customer ought to be established; (ii) the would be customer has to put his signature down in the specimen card so that the same could be scanned; and (iii) the customer should also have a reason to open an account. There is no evidence that the third defendant checked the plaintiff's identity card; and if they did they would have noticed that the address provided belongs to the first defendant (*Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 CLJ 1 (FC)). The third defendant failed to ensure that the plaintiff's interest is protected at all times (*Barclays Bank plc v Ouincecare Ltd & Anor* [1992] 4 All ER 363).

[12] This is a case where the plaintiff disputes that the payments were made with his authority. The point to note, however, is that all the transactions carried out by the first defendant under the mandate. A paying bank acts as its customer's agent and as such it acts on the mandate. *Paget's Law of Banking*, defines a mandate as an agreement which authorises the bank to pay if given instructions in accordance with its terms. Typically, the mandate will list the individuals who have authority to sign cheques or other payment orders and will specify how many individuals (if more than one) must sign any given order. A bank which acts in accordance with the mandate is duly authorised. In fact a bank is under a duty to obey a customer's mandate.

[13] However, according to the statement of account eight cash withdrawals amounting to RM235,611.91 were made on 13 May 1999 and 14 May 1999. It is the plaintiff's contention that the substantial cash withdrawals within two days were unusual that this must have alerted the third defendant. Notwithstanding this fact, the third defendant failed to verify the cash transactions with the plaintiff. The court agrees with the plaintiff's contention. The third defendant cannot rely on the mandate to turn a blind eye to any unusual or out of the ordinary cash withdrawal. The eight cash withdrawals by the first defendant in the short span of time was not only unusual but so out of the ordinary that it ought to have aroused doubts in the third defendant's mind and caused the third defendant to make inquiry of the plaintiff (*Commissioners of Taxation v English, Scottish and Australian Bank, Ltd* [1920] AC 683 (PC)). As far as the third defendant is concerned, it appears that there was nothing extraordinary about the huge cash withdrawals in the two day period. In cross-examination Adabi bin Abu Bakar ('DW2') the assistant vice president said that all the case withdrawals were transacted through cheques. DW2 was not certain if the cheques in question were signed by the first defendant and drawn in favour of the first defendant as payee. There is no evidence that the third defendant made any inquiry of the plaintiff. Notwithstanding that there is a mandate, in the circumstances aforesaid it is plainly the duty of the third defendant to make inquiries. The relationship between the third defendant (a banker) and the plaintiff (a customer) relating to the drawing and payment of the plaintiff's cheques against the money in the account was that of principal and agent; and as agent the third defendant owed fiduciary duties to the plaintiff and prima facie was also bound to exercise reasonable care and skill in carrying out the instructions of the plaintiff. The standard of care to be observed is that derived from the ordinary practice of bankers (*Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201 (HL)). On the facts, the court finds that as the third defendant had acted recklessly in failing to make such inquiries as an honest and reasonable person would. The question is therefore answered in the negative.

(c) Whether the third defendant observed reasonable skill and care in and about executing the plaintiff's orders when RM439,939 was transferred from the account to the first defendant's account

[14] The cashier's order for RM439,939.07 in the plaintiff's name was credited into the account on 14 June 2000. On 16 June 2000 the first defendant transferred RM439,439 into the first defendant's account with the third defendant. On 19 June 2000 the first defendant also made a cash withdrawal of RM500 from the account leaving a credit balance of RM9.83. Mohd Nazim bin Hj Pa'at ('DW1') a branch manager testified that in both instances the payments were effected under cheques signed by the first defendant. DW1 agreed in cross-examination that from the date the account was opened, the first defendant operated the account on each and every occasion. DW1 did not know which officer approved the clearance of the cheque for RM439,439 from the account to the first defendant's account. DW1 admitted that the third defendant did not take any steps to locate Kamarudin who was the branch manager at the material time.

[15] In this instance the third defendant did not make any inquiry of the plaintiff as to the payment of RM439,439 and RM500 to the first defendant. It did not appear to the third defendant that the said payments were unusual or out of the ordinary. The third defendant was aware that the plaintiff had redeemed the loan with the third defendant when SCB paid the third defendant RM520,060.93 for the redemption sum. The cashier's order for RM439,939.07 in the plaintiff's name was credited into the account. In these circumstances the first defendant's withdrawal of RM439,439 did not raise any doubt in the third defendant's mind. The fact that almost immediately after RM439,939.70 was credited into the account RM439,439.00 was transferred into the first defendant's account ought to have raised doubts in the third defendant's mind leading to the making of an inquiry before the transfer is approved. The manner in which the transaction was carried out was as if it was an ordinary everyday transaction. In the circumstances involving the drawing and payment of the plaintiff's cheques against the plaintiff's monies in the account, the third defendant as a banker owed a duty to exercise reasonable skill and care in carrying out the instructions of the plaintiff. On the evidence, it appears that the third defendant carried out the instructions of the plaintiff blindly relying entirely on the mandate. As the third defendant had shut its eyes and failed to make such inquiries as a reasonable man would make, the third defendant plainly failed to exercise reasonable skill and care when carrying out the plaintiff's instructions. For the foregoing reasons the question is answered in the negative.

(d) Whether the first defendant conspired with the third defendant to cheat the plaintiff

[16] The plaintiff contends that he had refinanced his bungalow house and the balance of the loan was credited into the account. The account was operated at all times by the first defendant with the full knowledge of the third defendant. The plaintiff was not privy to the dealings between the first defendant and the third defendant. Learned counsel for the plaintiff also argued that as of 6 May 1999 there was only the plaintiff's signature on the specimen card, whilst the mandate was executed on 10 May 1999 and only then the first defendant's signature was affixed on the specimen card. As the third defendant did not show any evidence how this instruction was given to them by the plaintiff, the only conclusion is that the first and third defendants were colluding to commit fraud on the plaintiff.

[17] It is trite that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish his case. If he fails to do so, it will not do for the plaintiff to say that the third defendant have not established their defence (*Selvaduray v Chinniah* [1939] MLJ 253 (CA); s 102 of the Evidence Act 1950). On the effect of the burden of proof not being discharged, Terrell Ag CJ in *Selvaduray v Chinniah*, adopting the position stated by the Court of Appeal in *Abrath v The North Eastern Railway Co* (1883) 11 QBD 440 said:

> In such a case as the present the position has been clearly stated in the judgment of Brett MR in *Abrath v The North Eastern Railway Co* (1883) 11 QBD 440 at p 452:
>
> But then it is contended (I think fallaciously), that if the plaintiff has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to this. It seems to me that the propositions ought to be stated thus: the plaintiff may give prima facie evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour; the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls them to answer; if they are, they must find for the plaintiff;

but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

Applying the principles laid down by the Court of Appeal in the above case, it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial the learned judge has found that the position was exactly even, ie that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the court that the plaintiff has not established his case and the learned judge has so found.

[18] The existence of fraud is a question of fact. It is dependent upon the circumstances of each particular case as stated by the Federal Court in *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136. In this case the onus is upon the plaintiff to establish the alleged fraud. The standard of proof is that of proof beyond reasonable doubt (see *Saminathan v Pappa* [1981] 1 MLJ 121; *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371; and *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23). Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 at p 38, (SC); *Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627; *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23). The trail of the misappropriated monies leads to the first defendant alone. There is nothing to suggest that the first defendant acted in concert with the third defendant. The first defendant enjoyed the absolute trust of the plaintiff to the plaintiff's detriment. On the totality of the evidence there is nothing for the court to justify a finding that the first defendant conspired or colluded with the third defendant to deprive the plaintiff of his monies. In the premises the question is answered in the negative.

[19] For the reasons adumbrated above the plaintiff's claim against the third defendant is allowed as follows:

(a) RM712,458.87;

(b) interest at the rate of 8%pa calculated from 2 March 2004 until date of satisfaction; and

(c) costs of RM50,000 in lieu of taxation.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum